Serbaguna Tunas Muda Sungai Ara v. Ghazali bin Ibrahim [1985] 2 MLJ at p. 226 adopt the statement in the judgment of Ackner LJ in *Banque de Paris v. de Naray* [1984] 1 Lloyd's Rep. 23 to the following effect:

> It is of course trite law that O. 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, *ipso facto*, provide leave to defend; the Court must look at the whole situation and ask itself whether the defendant has satisfied the Court that there is a fair or reasonable probability of the defendant's having a real or *bona fide* defence.

On the facts and the law, it would seem clear to me that there is no fair or reasonable probability of the defendant's having a real or *bona fide* defence.

For the reasons set out by me I dismiss the appeal with costs. The order of the Senior Assistant Registrar is affirmed.

GENTARO TANAKA & ANOR.

v.

SHOGO FUKUOKA & 9 ORS.

HIGH COURT, KUALA LUMPUR
DATO' HAJI ABDUL MALEK BIN HAJI AHMAD J.
[CIVIL SUIT NO. D5-22-190-93]
10 JUNE 1993

INJUNCTION: Application to set aside interlocutory injunction - Damages - Whether there exists serious question to be tried - Question of balance of convenience - Whether plaintiffs foreigners material to undertaking of damages - Whether writ served out of jurisdiction - Whether leave required - Section 23 Courts of Judicature Act 1964 - Order 6 r. 5 Rules of the High Court 1980.

The plaintiffs claimed that the first defendant had breached a joint venture agreement to purchase property with a view for resale and the proceeds to be shared at a certain ratio. The plaintiffs thus obtained an interlocutory injunction against all defendants with the usual undertaking for damages. The defendants applied to have the injunction set aside on the grounds that the plaintiffs being foreigners were outside of jurisdiction and having no assets in the country rendering their undertaking to damages useless whereas the first defendant through the second to the tenth defendant had assets within jurisdiction. The defendants also claimed that no leave was obtained to serve the writ out of jurisdiction as the first and ninth defendants are foreign nationals.

Held:

[1] On the question of jurisdiction and leave, leave was not necessary as eight of the defendants are in Malaysia and it is within the plaintiffs right to issue concurrent writs to all the defendants. Furthermore all the defendants had already entered unconditional appearance.

[2] It is not the Court's function to resolve conflicts of evidence on affidavits as to facts on which the claim either party depends on with detailed arguments which are only for consideration during trial.

[3] There must be on the facts of the case a serious question to be tried raised by the plaintiffs and here the plaintiffs have successfully done so.

[4] On the facts deposed the balance of convenience here are in favour of the plaintiffs.

[5] Accordingly the defendants application is dismissed with costs with liberty to apply for security for cost.

[Application dismissed with costs].

Cases listed at the end of the judgment as "Cases referred to":

American Cyanamid Co. v. Ethicon Ltd. [1975] 1 All ER 504
Anton Piller KG v. Manufacturing Processes Ltd. & Ors. [1976] 1 Ch. 55
Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn. Bhd. [1981] CLJ 134 / [1982] 1 MLJ 260
Altertext Inc v. Advanced Data Communications Ltd. & Ors. [1985] 1 All ER 395
Hamzah bin Abdul Majid & Anor. v. Sungei Way Leasing Sdn. Bhd. [1986] 1 CLJ 293 / [1986] 1 MLJ 471
Parkway Properties Pte. Ltd. v. Page One - The Book Shop Pte. Ltd. & 156 Ors. [1986] 1 MLJ 291
J.H. Rayner (Mincing Lane) Ltd. & Ors. v. Manilal & Sons (M) Sdn. Bhd. & Anor. [1987] 1 MLJ 312
Toh Boon Leng v. Ajit Singh Jessey (sued as Secretary for and on behalf of Hash House Harriers, Penang) [1990] 2 CLJ 862
Associated Tractors Sdn. Bhd. v. Chan Boon Heng & Anor. [1990] 2 CLJ 157 / [1990] 2 MLJ 408
Khoo Soo Teong v. Khoo Siew Ghim & Anor. [1991] 3 CLJ 2063 / [1991] 3 MLJ 158
Niino & Co. Ltd. v. Kow Lup Kai [1992] 1 MLJ 463
Khoo Cheng Yee v. Khoo Teng Seong & 3 Ors. [1992] 4 CLJ 2140 / [1992] 1 AMR 47 292
The HLT Group Ltd. v. Holborn Law Tutors Sdn. Bhd. & 2 Ors. [1993] 1 CLJ 236
Television Broadcasts Ltd. & Ors. v. Mandarin Video Holdings Sdn. Bhd. [1983] 2 MLJ 346.

Legislation referred to:

Courts of Judicature Act 1964, s. 23
Rules of the High Court 1980, O. 6 r. 5

For the plaintiffs - Harcharan Singh; M/s. Chong Harcharan Hashim
For the defendants - J. Pillay; M/s. Kadir, Tan & Ramli

JUDGMENT

Haji Abdul Malek bin Haji Ahmad J:

On 25 February 1993, I had granted the plaintiffs an injunction restraining all the defendants from selling, transferring, disposing, charging or incumbring or otherwise dealing (hereinafter all these actions will be referred to as "dealing") with any or all of the shares in the second to the tenth defendants, the first and second defendants from dealing with seventeen numbered units in Block 3 of "Sri Kenny" developed by Kepland Sdn. Bhd., the first and third defendants from dealing with four numbered units, the first and fourth defendants from dealing with three numbered units, the first and fifth defendants from dealing with two numbered units, and the first and sixth defendants, and the first and seventh defendants, respectively from dealing with one numbered unit, in "Wickham Manor" developed by Nexus Sdn. Bhd.

In addition, the second to the tenth defendants were restrained as regards themselves individually from parting with possession, power, custody or control of or over or destroying or defacing or altering or hiding any of the following:

(i) minutes of the Board of Directors' meetings held from the date of incorporation to the date of the order;
(ii) minutes of all General Meetings held from the date of incorporation to the date of the order;
(iii) all resolutions passed by the Board of Directors and General Meetings from the date of incorporation to the date of the order;
(iv) all sale and purchase agreements, loan agreements, assignments and other agreements, documents, letters and other written communications relating to or touching upon their shares and the immovable properties referred to against their names;
(v) audited accounts from the date of incorporation to the date of the order;
(vi) all statutory and other books and documents, common seals and certificates of incorporation.

The second to the tenth defendants were also ordered whether by themselves or by any persons appearing to be in charge of their premises to permit at any hour between 9.00 a.m. and 5.00 p.m. the person who shall serve the order to be made upon them together with such persons not being more than four in number as may be duly authorised by the plaintiffs' solicitors to enter the said premises for the purpose of inspecting, photocopying and looking for and removing into the plaintiff's solicitors' custody each particular defendant's articles and documents.

The order had also stipulated that pending trial or until further order Encik Syed Md. Amin bin Syed Jan Aljeffri of Messrs Aljeffri & Co., a Public Accountant, be appointed receiver and manager to receive and manage the affairs, business assets and property of the second,

third, fourth, fifth, sixth, seventh, eighth and tenth defendants (hereinafter "the relevant defendants") in particular the immovable properties referred to against their names without security and in particular to do one or more of the following:

(a) to take possession, custody and control and enter, receive and retain all assets, properties, cash, securities, agreements, deeds, books and documents of the relevant defendants;
(b) sell, transfer or dispose of any or all of the said immovable properties at the prevailing market price and with the sanction of the court with all reasonable dispatch and to execute all documents necessary therefor with power to postpone such sale as he deems fit;
(c) hold the proceeds of such sale upon an interest bearing account;
(d) until sale as aforesaid to receive all monies relating to and rents and profits of the said immovable properties and place the same in an interest bearing account;
(e) to assume all powers of the directors and other principal officers of the relevant defendants save and except the said directors' lawful duties relating to preparation of accounts which are to be carried out by the said directors and not the receiver and manager;
(f) to do all acts and take all steps and execute deeds, agreements, receipts or other documents for and on behalf of the relevant defendants;
(g) to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the relevant defendants and to effect changes to the signatories of the said relevant defendants' bank accounts;
(h) to make all payments arising out of or incidental to the carrying out of the functions of receiver and manager including all costs, charges and expenses borne by the receiver and manager;
(i) to appoint and remunerate suitable persons as managers, agents, officers and employees of the relevant defendants;
(j) to appoint and remunerate qualified professionals including solicitors where necessary to assist the receiver and manager in the execution of his powers and duties;
(k) to terminate if deemed necessary the employment of any manager, agent, servant or workman of the relevant defendants;
(l) to terminate if deemed necessary any or all contracts entered into by the relevant defendants;
(m) to do all things incidental to and conducive in executing the powers and duties of receiver and manager,

and that provision be made for the remuneration of the receiver and manager and that all necessary and proper directions may be given.

This order had been granted upon a certificate of urgency and upon the usual undertaking for damages. The defendants had also upon a certificate of urgency accordingly applied on 19 March 1993 to set aside the said orders and for damages to be assessed in their favour by the grant of the said orders.

Substantially, the facts are not really in dispute. As submitted by learned Counsel for the defendants, the first defendant had obtained a loan from a Japanese mortgage company and Fuji Bank with property belonging to the second plaintiff as security and further guaranteed by the first defendant, his wife and the first plaintiff. The plaintiffs had said that the purpose was to purchase real property in Malaysia which was to be undertaken by the first defendant who was given absolute discretion and the relevant projects had not been identified at the outset. The parties had also agreed that the profits were to be divided between the first plaintiff and the first defendant at the ratio of 6 to 4 respectively. The first defendant was to be wholly liable for losses but it was agreed that in the event the first defendant allowed the first plaintiff sixty per cent of the ownership in the second to the tenth defendants then the distribution of losses would be in the same ratio as the profits.

The plaintiffs had contended that there had been a breach of agreement as the first defendant had failed to set up a company called SMG Sdn. Bhd. and to invest in the Song Pang Seng condominium project. This had been denied by the first defendant.

Learned Counsel for the defendants had also reiterated that the plaintiffs were outside the jurisdiction and have no assets in the country rendering their undertaking for damages useless whereas on the other hand the first defendant through the second to the tenth defendants have sufficient assets here. She had also argued that the plaintiffs had not shown any real threat of damage to the documents held by the defendants, that no leave had been obtained to serve

the writ out of the jurisdiction, that the plaintiffs were not shareholders of any of the defendants and that this was a mere joint venture between the parties. Her view was that on these grounds the injunction ought to be set aside.

Learned Counsel for the plaintiffs had given his version of the facts as follows. The first plaintiff and the first defendant are Japanese residents and citizens and that sometime in 1990 at the behest of the first defendant, the first plaintiff had agreed to enter into a joint venture with the first defendant to purchase real estate property in Malaysia with a view to resale and to share profits at the ratio of 6 to the first plaintiff and 4 to the first defendant. Initially, the agreements were verbal but subsequently they were reduced into writing in the form of three agreements.

The arrangement was for a local company to be set up in Malaysia to be called SMG Sdn. Bhd. the first letter S being the first defendant's first initial, the second letter M the first initial of one Martin Manen and the third letter G the first initial of the first plaintiff. The funding was to come in two ways. For their first project the first plaintiff and the first defendant had identified the Song Pang Seng building and all preliminary work had been done by the first defendant. The first plaintiff, who does not know English, had been told that it would cost 3 billion yen, half of it to be raised in Tokyo by pledging the second plaintiff's property and by means of the first plaintiff's guarantees. The balance was to be raised in Malaysia by the first defendant.

Certain representations had been made by the first defendant to the first plaintiff that he would pledge his share worth 10 billion yen in the ninth defendant as security to the first plaintiff. The second plaintiff went ahead and mortgaged land based on these representations and the first plaintiff had entered into the guarantees. In all, both the plaintiffs had pledged properties worth RM30 million.

The plaintiffs are contending that a fiduciary relationship had arisen between them and the defendants, that the funds had not been properly used, that the first defendant controls the second to the tenth defendants, that although a Malaysian namely Martin Manen was to be involved, all the projects are being managed by several two ringgit companies, that the funds were used for dealings where the plaintiffs were not involved and were not informed and that up to the present the first defendant had not made any proper account of the RM30 million.

On the question of jurisdiction and leave to serve outside it, learned Counsel for the plaintiffs had referred to s. 23 of the Courts of Judicature Act 1964 and O. 6 r. 5 of the Rules of the High Court 1980 to support his argument that leave was not necessary as eight of the defendants, except for the first and the ninth, are in Malaysia and that it was within the plaintiffs' right to issue a concurrent writ against all the defendants. In any event, he added, the defendants had already entered unconditional appearance. On this point, I must emphasise that I found favour with the arguments of learned Counsel for the plaintiff.

On the facts, the factors to consider can be appropriately summed up by the relevant excerpt in *American Cyanamid v. Ethicon* [1975] 1 All ER 504 which states:

> it is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages on the grant of an interlocutory injunction was that 'it aided the Court in doing that which was its great object, namely abstaining from expressing any opinion upon the merits of the case until the hearing'. So unless the material available to the Court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claims for a permanent injunction at the trial, the Court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought. As to that, the governing principle is that the Court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong

the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the Court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason on this ground to refuse an interlocutory injunction. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case. Where other factors appear to be evenly balanced it is a Counsel of prudence to take such measures as are calculated to preserve the *status quo*.

Consequently, it was my finding that there was a serious question to be tried and, guided by the relevant authorities on this point, the balance of convenience certainly lay in favour of the plaintiffs. I had accordingly dismissed the defendants' application with costs but they were given the liberty to apply for security for costs if they thought it necessary in the circumstances.

LAM ENG RUBBER FACTORY (M) SDN. BHD.

v.

STATE DIRECTOR, KEDAH & ANOR.

HIGH COURT, ALOR SETAR
DATO' K.C. VOHRAH J.
[ORIGINATING MOTION NO. 32-33-1987]
1 JULY 1993

LAND LAW: Appellant applied for land to be converted from agricultural to industrial - Application rejected by second respondent - Notice given to demolish old factory on land and replanted with rubber - Appellant appealed under s. 418 of the National Land Code - To quash notice to remedy breach of condition pursuant to s. 128 NLC issued by respondents - To quash decision made under s. 124 NLC of 1st respondent - Whether applicant breached condition when rubber factory built on land - Whether s. 110(a) NLC applicable - Whether subject to implied conditions - Sections 53 & 115 NLC - Whether direction to demolish factory and plant rubber trees valid.

DECLARATION: Whether declaration can issue - To nullify s. 128 NLC notice - Whether contravened Article 13 and 18 of Constitution and s. 53 of NLC for non-compliance of natural justice - Whether prayer for declaration in appeal application proper - Section 418 NLC - Order 55 r. 13 & O. 15 r. 16 RHC 1980.

The applicant company is the current owner of a piece of land which formed part of a bigger rubber estate. On the said land was a factory which the applicant claimed was built at least in 1940 but the respondents claimed was built in 1970. In 1983 applicant applied for conversion of the category of land use of the said land from "agricultural" to "industrial" under the NLC. The application was rejected the second respondents gave notice in Form 7A under s. 128 of the NLC to demolish the factory within 3 months and to plant rubber trees on the said land within that period.

The applicant appealed under s. 418 of the NLC to quash the notice to remedy a breach of condition under s. 128 of NLC issued by the 2nd respondent and to quash decision of 1st respondent made under s. 124 of the NLC in rejecting the applicant's application. The applicant also applied for the suspension of the operation of the notice until the end of the present proceedings and for an order that the application for variation of the category of land use be remitted for re-hearing and determination.